280 Md. 525, 375 A2d 1098

Renee DuBOIS et al.

v.

CITY OF COLLEGE PARK et al.

No. 135.

Court of Appeals of Maryland.

July 1, 1977.

ELDRIDGE, Judge.

This case presents the question of whether an action for declaratory judgment instituted by three registered voters of the City of College Park, seeking a declaration that the councilmanic districts of the city were unconstitutionally apportioned, was properly dismissed on the ground that the plaintiffs were not "bona fide residents of College Park" and therefore lacked standing to maintain the action.

The action was brought in the Circuit Court for Prince George's County. It was alleged that the plaintiffs, Renee Dubois and David Johnson, are students at the University of Maryland, residents of College Park, and registered to vote in city elections pursuant to the city charter. Later, Zachary Kinney, who was also alleged to be a student at the University of Maryland, a resident of College Park and a

registered voter of the city, was added as a party plaintiff. The plaintiffs claimed that the 1970 College Park census shows that the present councilmanic districts, established in 1967, are unequally apportioned and that the city, although having had an adequate opportunity to so so, has failed to reapportion the districts. It was alleged that, as a result of this malapportionment, the votes of the plaintiffs and those similarly situated are debased and they are deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. The action was brought by the plaintiffs in their own behalf and on behalf of all those University of Maryland students similarly situated. The basis of the plaintiffs' complaint, as developed at trial, is that the population figures upon which the councilmanic districts are

apportioned exclude students residing on the campus of the University of Maryland with the result that the two "student" districts contain two to three times the population of the "non-student" districts.

The City of College Park, while contending that the districts are constitutionally apportioned on the basis of population figures including only bona fide residents of College Park, argued primarily that the plaintiffs did not have standing to maintain the action and were not proper representatives of the class which they purported to represent. Although the city did not attempt to controvert the allegation that the plaintiffs were duly registered voters of the City of College Park, it did present evidence, over the plaintiffs' objections, that the plaintiffs actually resided in areas other than College Park and therefore should not have been allowed to register as voters of

College Park.

At the conclusion of the trial and submission of legal memoranda, the trial court dismissed the action for lack of standing. The court reasoned that, under the criteria set forth in Bainum v. Kalen, 272 Md. 490, 325 A.2d 392 (1974), none of the plaintiffs were actually domiciled in College Park and therefore were not injured by the alleged malapportionment. Additionally, the court found that although two of the plaintiffs, Kinney and Johnson, lived in districts which, "if their contentions prevail, are underrepresented," the third plaintiff, Renee DuBois, lived in a district which was overrepresented. Therefore, the court found that even if Renee DuBois were domiciled in College Park, she should not be injured by the apportionment scheme and would not have standing to challenge the city's districting. Finally, the court held that

the suit could not be maintained as a class action because the plaintiffs, as nonresidents, were not members of the class they purported to represent: those students of the University of Maryland who are residents of College Park and eligible to vote in city elections. The circuit court did not consider the merits of the case, i.e., whether the districts were malapportioned.

The plaintiffs took an appeal to the Court of Special Appeals, and this Court issued a writ of certiorari to review the case prior to any decision by the Court of Special Appeals.

The plaintiffs contend that the fact that they are duly registered to vote in city elections pursuant to the College Park charter is sufficient to confer standing. They contend that the city cannot challenge their status as qualified voters in this proceeding by introducing evidence

that they are not residents of College Park when the city has, in accordance with the procedures set forth in the city charter, registered them as voters. Because standing in an action challenging the constitutionality of apportionment of voting districts is premised upon the plaintiffs' status as registered voters, and because the city did not deny, but in fact admitted, that the plaintiffs are registered voters, the plaintiffs argue that the circuit court should not have gone behind the plaintiffs' status as voters. It is argued that a court must find that, at this time, the plaintiffs have standing to challenge the constitutionality of the city's apportionment scheme. We agree.

In Baker v. Carr, 369 U.S. 186, 204-208, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), in determining whether voters have standing to challenge the constitutionality of apportionment of state legislative

districts, the Supreme Court stated that the question of standing depends upon whether the party has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." Relying upon its prior cases, the Court held that "voters" who reside in allegedly malapportioned legislative districts sustain a "legally cognizable injury" and therefore have standing to maintain an action challenging the apportionment scheme. In the instant case, the city does not deny that the plaintiffs are registered voters of the City of College Park. As far as the record discloses, the city never instituted proceedings to have the plaintiffs' names removed from the registration lists, and the order in this case does not, and

indeed cannot, affect the status of the plaintiffs as eligible voters. The plaintiffs, therefore, are still registered "voters," eligible to participate in College Park elections and thus, in view of Baker v. Carr, supra, would appear to have standing to maintain this action.

Moreover, the city charter provides procedures for the removal from the registration lists of those voters who were either improperly registered or who subsequently become ineligible. Although the city has not affirmatively sought to have the plaintiffs adjudicated as ineligible to vote, it in essence argues that the plaintiffs are not eligible to vote because they do not meet the residency requirement of Section 14 of the City of College Park Charter. However, our prior cases indicate that where a statutory remedy is available to challenge the qualifications of voters on the registration

lists, that statutory remedy is the exclusive method for challenging the qualifications of registered voters. The registration lists, in the absence of allegations of fraud on the part of election officials, are conclusive evidence of the qualifications of voters, and the qualifications of voters may not be challenged in collateral proceedings. Lee v. Sec. of State & Mahoney, 251 Md. 134, 246 A.2d 562 (1968); Moore v. Bay, 149 Md, 286, 292-295, 131 A. 459 (1925).

In Lee v. Sec. of State & Mahoney, supra, the plaintiff challenged the right of a candidate to run in a general election as an independent. The challenge was based upon the contention that the Board of Supervisors of Elections had improperly reopened the voter registration books, during which time the candidate changed his party affiliation from Democrat to "decline." To be eligible to run as an

independent, the candidate must be registered as a "decline." This Court agreed that the Board, because of a misinterpretation of the election laws, had improperly reopened the registration books and allowed the candidate to change his party affiliation. However, the Court refused to declare the candidate ineligible despite the improper voter registration and affirmed the trial court's action dismissing the voter's challenge. The Court noted that the election code set forth administrative and judicial procedures by which the voter registration lists could be challenged and that the plaintiff had failed to follow these procedures. The Court held that the statutory procedures provided the exclusive remedy for the correction of the voter registration lists. Additionally, the plaintiff argued that the statutory remedy need not be followed since the purpose of the challenge was not to

correct the voter registration lists but rather to have the candidate declared ineligible to run as an independent. In rejecting this argument, the Court pointed out that the eligibility of the candidate to run as an independent depended upon his status as a registered "independent" voter, and that this could be raised only pursuant to the statutory procedures, 251 Md. at 141, 246 A.2d 562.

In Moore v. Bay, supra, two unsuccessful candidates in a municipal election challenged the validity of that election on the ground that some registered voters participating in the election did not possess all of the qualifications required by the city charter and therefore were not legally qualified to vote. After stating that the validity of the election turned upon the question of the effect to be given to the registration lists, this Court held that the election was valid because it was

the intent of the election laws "to make the final registration lists of voters conclusive evidence of those entitled to vote at the ensuing municipal election." Moore v. Bay, supra, 149 Md. at 296, 131 A, at 463. In reaching this conclusion, the Court noted that the local election law, which incorporated by reference consistent provisions of the state election laws, provided a comprehensive plan for the maintenance of registration lists. Thus, the local election law required that the city clerk enter on the registration lists only those applicants who satisfied the clerk by proof, under oath, that they met the qualifications of voters set forth in the city charter. The registration lists so compiled by the clerk were then to be reviewed by city officials and "any person (who) should feel himself aggrieved by the action of the clerk in registering . . . . the name of any person" could

obtain a hearing before the city council to contest the registration. An appeal from the determination of the city council could be taken to the circuit court. Additionally, the local law provided that the penalties prescribed by the general election laws should apply to all municipal elections. Id at 291, 294, 131 A. 459. This Court concluded that these were sufficient procedures to insure the integrity of the registration lists, and that the election laws evidenced an intent that the registration lists, compiled according to these procedures, should be conclusive evidence of qualified voters of the city.

The qualifications for voters of the City of College Park, and the procedures for registering voters for city elections are found in Sections 12 through 17(A) of of the city charter. These procedures are similar to those involved in Moore v. Bay, supra. Any person who is entitled to

register as a voter of the State of Maryland under the general election laws and who "shall have his actual residence in the City of College Park, in the sense that he had no other residence elsewhere, for the period of ninety (90) days next preceding a municipal election," is entitled to register if he satisfies the registering officer of these facts. Additionally, applicants who are registered to vote elsewhere in the State are required to file an affidavit affirming, inter alia, their intent to be members of the College Park community Section 14 of the charter. Persons registered pursuant to these provisions "shall be qualified voters of the City of College Park," Section 12 of the charter. Additionally, Section 15 of the College Park Charter provides that "(t)he proceedings for the registration of voters and the maintenance of registration lists . . . . shall conform as nearly as may be possible

to the proceedings for the registration of voters and the maintenance of registration lists under the general election laws of this state." Under a provision of the state general election law, Maryland Code (1957, 1976 Repl. Vol.), Art. 33, Section 3-16, which is made applicable to College Park elections by virtue of Section 15 of the city charter, any voter may file with the proper election officials "objections to the registration of any person whom such voter has reason to believe is not eligible to vote." Notice must be sent tothe challenged voter, and a hearing must be held on the challenge by the election officials, with the presumption being that the voter is properly registered, Section 3-16(c), (d).[1] An appeal

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1. "(a) Who may file challenge or application for correction of

may be taken from any action by the officials to the circuit court, Section 3-21. Additionally, election officials are to remove from the registration lists the names of those voters whom they have reason to believe have moved from the election district after proper notice to the voter, Section 3-17.

As in Moore v. Bay, supra, the provisions found in the College Park Charter, as well as those provisions of the general election laws made applicable to College Park elections, provide sufficient

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list; when and where filed. Any voter may file with the board or with the board of registry objections to the registration of of any person whom such voter has reason to believe is not eligible to vote, or a request for the addition of any person whose name

has been erroneously omitted or dropped from the registration list of any such percinct registration list or a challenge of the right to vote of a person named on such list may be made by any qualified voter at the office of the Board on or before the Tuesday, sixteen weeks preceding any primary election.

"(b) Manner of making application or challenge. Such applications or challenges shall be made in the form provided by subsection (e) of this section and the forms shall be provided by the board for that purpose. The voter shall state thereon, under oath and of his own personal knowledge, the reason for

the application or challenge. Thereafter the voter so applying or challenging shall be required to appear in person at the time of the hearing on the application or challenge as provided for in subsection (d) of this section and for wilful failure to so appear shall be subject to the penalties provided for in Section 24-27 of this article.

"(c) Notice; voter may appear in person or by counsel. Persons whose right to register has been challenged and persons whose names are alleged to have been erroneously omitted or dropped from the registration lists shall be given written notice, sent by mail, addressed to the voter at the last address

given on his registration form. Any voter so notified may appear in person or by counsel.

"(d) Hearing and action of board on applications and challenges. The board of registry shall sit for the purpose of hearing applications for changes in such registration lists, or challenges of the right to vote on such lists. They shall meet on the Tuesday fourteen weeks before an election at such hours as the board may designate. If all such applications or challenges be not determined on that day, they shall sit during the same hours on succeeding days until all cases are heard and decided. If it is not possible to hear all such cases within two days,

the board may appoint one or more boards of registry, each consisting of two members of opposite political parties, to aid in hearing such applications or challenges at a rate of compensation fixed as provided in Section 2-6 of this article. At the request of either party, the board shall issue subpoenas to witnesses to appear at such hearings, who shall be sworn and examined. All cases shall be decided immediately after hearing. No voter as to whom an application or a challenge has been made shall be removed from the registration lists unless the application or challenge is substantiated by

affirmative proof. In the absence of such proof, the presumption shall be that the voter as to whom the application or challenge was made is properly registered. If the board is satisfied that the person so challenged, omitted or dropped from the registration lists has actually moved to another precinct and is presently residing within that other precinct, the board may transfer that person to the registration list of the precinct in which he presently resides.

"(e) Form of challenge. Objections to the registration of any person shall be made on a form prescribed

safeguards to insure that only qualified voters appear on the registration lists, and to demonstrate the intent of the election laws that the registration lists be deemed conclusive evidence that those who are registered are qualified voters. Moreover, a specific statutory procedure has been provided for correction of the registration lists. Generally, where a special statutory remedy is provided, that remedy is usually deemed exclusive, and "the litigant must adopt that (remedy) and must not by-pass the administrative body or official, by pursuing other remedies." Schneider v. Pullen, 198 Md. 64, 68, 81 A2d 226, 228 (1951); accord,

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by the State Administrative Board of Election Laws."

Soley v. St. Comm'n on Human Rel., 277 Md. 521, 526, 356 A.2d 254 (1976); Agrarian, Inc. v. Zoning Inspector, 262 Md. 329, 332, 277 A.2d 591 (1971); Lee v. Sec. of State & Mahoney, supra. If it is believed that the plaintiffs are not qualified voters and should be removed from the voter registration lists, the procedures set forth in the election laws should be followed. The city cannot, by merely moving to dismiss for lack of standing in this proceeding, contest the fact that those registered according to the city charter are not qualified voters. See Lee v. Sec. of State & Mahoney, supra, 251 Md. at 141-142, 246 A.2d 562. We hold, therefore, that the plaintiffs, as registered voters, having standing to maintain the present action.

(8,9) The trial court also dismissed the action as to Renee DuBois on the

alternative ground that, as a resident of a councilmanic district which was "overrepresented," she had sustained no injury and therefore lacked standing to maintain this action. However, in view of Swann v. Adams, 385 U.S. 440, 443, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967), where the Supreme Court held that residents of a legislative district which received consitutional treatment under a redistricting plan had standing to maintain an appeal, Ms. DuBois would appear to have standing to maintain this action. Moreover, Art III, Section 5 of the Maryland Constitution, although not applicable to municipal legislative bodies, does reflect a State policy that any registered voter has a sufficient interest in the apportionment of electoral districts to challenge the constitutionality of a reapportionment scheme. Article

III, Section 5, expressly authorizes "any registered voter" to petition this Court to review the legislative districting plan for the General Assembly of Maryland. We therefore hold that Renee DuBois, as a registered voter of College Park, has a sufficient interest in the apportionment of that city's councilmanic districts to have standing to maintain this action.

(10) Finally, the trial court dismissed the class action on the ground that since the plaintiffs were not residents of the City of College Park they were not proper representatives of the class of persons whom they purported to represent. That class is composed of persons who are inter alia, residents of College Park and qualified to vote in all city elections. It follows from the fact that because the plaintiffs are registered voters of the City of

College Park, they are, for voting purposes, residents of the City of College Park. Therefore, we hold that the plaintiffs are proper representatives of the class which they purport to represent.

Because we hold that the trial court erred in dismissing this action, both as to the plaintiffs individually and as to the class action, we will remand this case to the Circuit Court for Prince George's County for consideration of the merits. We wish to emphasize that our holding in this case is limited to the question of whether the trial court, in this action, properly considered evidence as to the plaintiffs' status as residents of the City of College Park where their status as registered voters had not been challenged in a proper proceeding. We express no

opinion as to whether the plaintiffs are domiciled in College Park, and nothing contained herein should prejudice the rights of any parties in any proceeding in which the plaintiffs' registration in properly challenged.

JUDGMENT REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.

286 Md. 677, 410 A2d 577

Renee DuBOIS et al.

CITY OF COLLEGE PARK et al.

No. 139.

Court of Appeals of Maryland.

Jan. 28, 1980.

ELDRIDGE, Judge.

The largest campus of the University of Maryland is located in the City of College Park in Prince George's County, Maryland. Pursuant to a court order to reapportion its councilmanic districts, the City of College Park adopted a revised apportionment plan that excluded from its population apportionment base a large segment of students who lived in the University's dormitories. The issue before us is whether the circumstances of this case, violated the equal protection of the laws, and particularly the "one person one vote" principle of Baker v. Carr, 369 U.S. 136, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and their progeny.

The City of College Park is divided into eight councilmanic districts, each

of which electsone councilman to the City Council. The College Park campus of the University of Maryland is largely contained in parts of the third and fifth districts-often referred to as the "student" district. All dormitories are within the third and fifth districts. On the other hand, some fraternity and sorority houses, in which students also reside, are located in the second district.

In connection with its apportionment plan adopted in 1967, the City of College Park had to determine a population apportionment base, from which would be calculated the equal number of persons that would be included in each of its eight districts. The City arrived at its apportionment base by subtracting from its total

federal census population, which included all students physically residing in the City of College Park, those students who physically resided in dormitory facilities at the University.[1]

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1. Although all parties consistently refer to the excluded students as "on-campus" students and other students as "off-campus" students, it is not entirely clear what was meant by those terms. It appears that the phrase "on-campus" students refers to those students who live in dormitory facilities situated on property located within the actual physical boundaries of the University. All "on-campus" students

After the 1970 federal census was conducted, the City established a reapportionment committee. Although the reapportionment committee. Although the reapportionment committee developed several different reapportionment plans, none was adopted by the City, and it continued to use the apportionment plan of 1967.

In October 1975, three students began the instant proceedings by filing a class action in the Circuit Court for Prince George's County, alleging that the 1970 census showed the councilmanic districts to be unequally apportioned. The plaintiffs claimed that as a result of this malapportionment, the votes of the plaintiff class were unconstitutionally diluted. The named plaintiffs, Renee DuBois, David Johnson and Zachary Kinney, were alleged to be

students of the City of College Park, and registered to vote in City elections. One of the plaintiffs lived in a dormitory in the fifth district, one lived in a fraternity house in the third district, and one lived in a sorority house in the second district. The class represented by the named plaintiffs was defined as those students at the University of Maryland who were residents of the City of College Park and qualified to vote in all City elections.

As developed at trial, the basis of the plaintiffs' claim was that on-campus students were excluded from the apportionment figure which was used to determine the size of each councilmanic district of the City. As a result, according to the plaintiffs, their individual votes were diluted because the two councilmanic districts that include

the University of Maryland campus contained two or three times the population of the other six districts.

According to the evidence produced at the trial, the total population of College Park, as determined by the 1970 federal census, was 26, 156, which included the students who lived within the University's physical boundaries within the third and fifth districts, as well as students who lived elsewhere within the City. However, after interpolating the 1970 census figures into the eight districts as they were constituted under the 1967 apportionment plan, the City calculated that its new apportionment base would only be 17,517. Consistent with the method that it employed with the 1967 plan, the new apportionment base was arrived at by excluding from the 1970 census total population the

approximately 8,000 students, as determined by numbers supplied by University of Maryland officials, who resided in dormitories within the physical boundaries of the University.[2] The Mayor stated,

> 2. It is unclear whether this 8,000 student figure included students who resided in fraternity or sorority houses located in the third district, or whether is included students who resided in private residences in the third and fifth districts. It is clear that the 8,000 figure did not embrace any students who resided in districts other than the third or fifth districts. Therefore, the 8,000 figure did not include those students who resided in the fraternity and

sorority houses in the second district.

There is, however, some indication in the record that the 8,000 figure included only students who resided in the dormitories, which are located only in the third and fifth districts. Thus, there is an inference that students who lived in the fraternities and sororities in the third district and private residences in the third and fifth districts were not included in the 8,000 figure and that, therefore, these students were included by the City in the population base for the third and fifth districts.

would therefore be in the third and fifth districts. It is not completely clear whether the term "on-campus" also includes those residing in fraternities or sororities in the third district. The term "off-campus" students appears to refer to students who live in private residences or apartments, presumably including private residences in the third and fifth districts, and not on property physically located within the University's boundaries. In addition, all students living outside of the third and fifth districts are considered "off-campus" students. Thus, a student living in one of the fraternity or sorority houses located in the second district

would be deemed an "off-campus" student, just as if he lived in private housing. For the purposes of this opinion, we will accept what appears to be the parties' definitions of these terms. Therefore, "on-campus" students will refer to students who live in University residence facilities located within the boundaries of the University, which places those students in the third or fifth district. Off-campus" students will refer to students who live in all other districts within the City, including those who live in fraternities and sororities in the second district.

however, that the apportionment base of 17,517 included all students who resided in districts other than the third and fifth, and this fact was reiterated by counsel for the City at a hearing before the circuit court.

Based upon the 17,517 population figure, a perfectly apportioned plan would have had 2,190 persons in each district. All parties agreed, however, that if the students who resided within the physical limits of the University should have been included in the apportionment base, then the City's districts, even if changed to reflect 1970 population figures, would be malapportioned. If the 3.812 students living in University residence facilities in the third district and the 4,635 students living in University residences in the fifth district were added to

the population already included in these districts under the 1967 plan, as adjusted for the 1970 census, then the total population within these districts would be 5,843 and 6,906 respectively. These figures are far in excess of the 2,190 persons who would be in each of the other districts.

At the close of the trial, the circuit court concluded that none of the named plaintiffs was domiciled in College Park. Therefore, the court held that the named plaintiffs lacked standing to maintain the action. In addition, because the named plaintiffs were not deemed domiciliaries of the City, they were held to be outside of the class which they purported to represent. The circuit court dismissed the action for lack of standing.

The plaintiffs appealed to the Court

of Special Appeals, and this Court issued a writ of certiorari prior to a decision by the intermediate appellate court. We held that the plaintiffs, as registered voters of the City of College Park, had standing to maintain a suit challenging the City's apportionment. DuBois v. City of College Park, 280 Md. 525, 375 A.2d 1098 (1977). Further, we stated that the City, by moving to dismiss for lack of standing, could not collaterally challenge whether the plaintiffs were properly registered as voters. Instead, we held that any challenge by the City to the plaintiffs' status as registered voters must be made through the procedures prescribed by statute and the City charter for making such challenges. 280 Md. at 529, 533-534, 375 A.2d 1098. The case was remanded to the circuit Court.

After further arguments were held, the circuit court found that, in light of the 1970 census, the deviation between the actual population in each district and the number of persons who would constitute a properly apportioned district, was too large. The court, however, rejected the plaintiffs' claim that all on-campus students should also be included in the City's apportionment base. The circuit court reasoned that, according to the principles set forth by this Court in Bainum v. Kalen, 272 Md. 490, 325 A.2d 392 (1974), an on-campus student was presumed to be a domiciliary of his former place of residence. The court stated that a student could overcome this presumption by registering to vote in College Park, at which time the student must affirm by oath that he intended to remain a City domiciliary.

Therefore, the court held that equal protection principles did not require the inclusion of all on-campus students in the apportionment base because this would encompass transient nonresidents. The court further held that, because some of the students who resided within the University's boundaries had overcome the presumption of nonresidency by registering to vote in the City, the City was required to include in its apportionment base any student in the third or fifth district who had registered to vote. Moreover, the court noted that this inclusion of students who resided in the third and fifth districts, and who had registered to vote, would further increase the existing malapportionment in light of the 1970 census. The court then ordered the City to submit a new apportionment plan, consistent with its opinion, correcting the existing

malapportionment.

The City subsequently submitted a revised apportionment plan which, all parties agreed, conformed to the court's order. A final judgment approving the new plan was entered. The plaintiffs again appealed, and this Court again issued a writ of certiorari prior to a decision by the Court of Special Appeals.

The primary issue on this appeal is whether the approved apportionment plan, which in six districts included all students in the population base, and in two districts apparently included all off-campus students but only those on-campus students who had registered to vote, violates equal protection of the laws.[3] The plaintiffs contend that

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3. The City also has raised two arguments in a motion to

dismiss this appeal. First, it asserts that the plaintiffs failed in the trial court to present sufficient evidence in support of their contention that the revised apportionment plan is unconstitutional. Second, the City argues that the plaintiffs did not exhaust their administrative remedies because they did not oppose the new plan at a public hearing conducted as part of the City Council's adoption of the plan.

Preliminarily, we note that this case is properly within this Court's jurisdiction, and there are no violations of procedural requirements alleged that would warrant dismissal of the appeal. The two grounds urged by the City, even if meritorious, would not be grounds for dismissal.

Of course, an appellate court can affirm a decision of a trial court on any ground adequately shown by the record, even if it was not the ground relied on by the trial court, and even if it was not raised by the parties in the trial court. Robeson v. State, 285 Md. 498, 502, 403 A.2d 122a (1979). If the record were insufficient to show the invalidity of the apportionment plan, or if there were administrative remedies which should have been exhausted, these might be grounds for an affirmance.

Nevertheless, in this case both contentions by the City must fall on their merits. The evidence at the first trial, coupled with the type of new plan mandated by the circuit

the circuit court erred in holding that the City only had to include those on-campus students who had registered to vote instead of the entire on-campus student population. They argue that the inclusion

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court's order and the representations of the City's counsel at the hearing on the new plan, were counsel sufficient to present the equal protection issue raised by the plaintiffs.

With respect to the plaintiffs' asserted failure to exhaust their administrative remedies, the action of the City Council in adopting the revised plan was a legislative action and not a determination by an administrative agency. We are not aware of any principle of law stating that one affected by a legislative enactment may not challenge the validity

of all off-campus students in the apportionment base whether or not they are registered to vote, while requiring that on-campus students must register to vote in order to be included, creates an arbitrary classification.

The general principle governing legislative apportionment is that there "must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen." Reynolds v. Sims, supra, 377 U.S. at 579, 84 S.Ct. at 1390. See also St. Adm. Bd. of Elect. Laws v. Calvert, 272 Md. 659, 327 A.2d 290 (1974), cert. denied, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807 (1975).[4]

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of that enactment unless he had been present and testified at the legislative hearings.

4. The "one person one vote" principle wasinitially apllied to state legislatures and congressional districts. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed. 2d 481 (1964); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Since then, it has been extended to the election of county and municipal representatives where such governments exercise substantial governmental powers. See, e.g., Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971); Hadley v. Junior College District, 397 U.S. 50 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); Avery v. Midland County, 390 U.S. 474, 38 S.Ct. 1114, 20 L.Ed.2d 45

(1968); Montgomery County v. Garrott 243 Mf. 634, 222 A.2d 164 (1966). According to College Park's charter, Code of the City of College Park, Art. XI (1965), the City does or may exercise substantial governmental authority. Therefore, the apportionment of its councilmanic districts is clearly within the scope of the "one person one vote" principle.

Some differentiation among citizens with respect to the weight of their vote may be permissible it it related to "permissible purposes of legislative apportionment" or effected "a rational state policy," 377 U.S. at 565, 579, 84 S.Ct. 1362. Nevertheless,

> "if, even as a result of a clearly rational state policy . . . population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequatley weighted vote would be unconstitutionally impaired." (Id. at 581, 84 S.Ct. at 1392.)

Moreover, in deciding reapportionment cases like the present one, classifications having the effect of diluting a person's right to vote are subject to

careful scrutiny. This was explained by the Supreme Court in Reynolds v. Sims, supra, 377 U.S. at 561-562, 84 S.Ct. at 1381, as follows:

> "While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, such a case 'touches a sensitive and important area of human rights,' and "involves one of the basic civil rights of man,'

presenting questions of alleged 'invidious discriminations . . . against gourps or types of individuals inviolation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541, 63 S.Ct., at 1113. Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and poltical rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

Abate v. Mundt, 403 U.S. 182, 185, 91 S. Ct. 1904, 1906-1907, 29 L.Ed.2d 399 (1971); Kramer v. Union School District, 395 U.S. 621, 626-630, 89 S.Ct. 1886, 1889-1891, 23 L.Ed. 2d 583 (1969); O.C.

Taxpayers v. Ocean City, 280 Md. 585, 594, 375 A.2d 541 (1977).

The City has attempted to justify its exclusion from the apportionment base of on-campus students who have not registered to vote by arguing that these students are transients and are not in fact residents of College Park. The City accordingly argues that to include these non-residents would dilute the weight of the votes of true residents of theCity who would be expected to have a greater interest in municipal affairs. In support of tis argument, the City points to language in Burns v. Richardson, 384 U.S. 73, 91-92, 86 S.Ct. 1286, 1296-1297, 16 L.Ed.2d 376 (1966), where the Supreme Court stated:

> "We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the fed-

eral census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in . . . (the case of Reynolds v. Sims) and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. Indeed, in WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed. 2d 568 decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no diff-

erent from apportionments using a total population measure. Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e. g., Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, the resulting appor-

tionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby."

It is clear, however, that the City could not invoke the theory that students are generally transients, in order to deny the right to vote to any student who in fact met the voting qualifications of the City Charter.[5] See Evans v. Cornman,

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5. The voting qualifications are set forth in the City's charter. Code of the City of College Park, Sec. 14 (1965.) They are:

"Except as otherwise provided herein, any person possessed of all the qualifications that are necessary to entitle a person to exercise the right to register as a voter of the State of Maryland, under the

general election laws, shall be a citizen of the United States and at least eighteen (18) years of age on or before election day and shall have his actual residence in the City of College Park, in the sense that he had no other residence elsewhere, for the period of ninety (90) days next preceding a municipal election and shall satisfy the Registering Officer of these facts. Any applicant to register who shall be registered as a voter elsewhere in the State of Maryland shall not be permitted to register unless there is filed with the Registrarion Officer of said city the applicant's following affirmative affidavit under oath:

A. Do you hereby affirm your intent to be a member of the City of College Park community?

B. Are you presently registered to vote in a state other than Maryland, a county other than Prince George's or any other municipality, and if so, will you cancel that registration as soon as practicable after this registration is completed?

C. Are you aware that when you register in the City of College Park, it will thenceforth be presumed that your residence is here for voting purposes and that you will have to overcome that presumption should you later attempt to register in a

state or county or municipality other than Maryland, Prince George's County the City of College Park, respectively, and do you accept this fact? The word 'residence' for these purposes means the affiant's primary residence, the place where he will be registered to vote, where he presently resides, and plans to reside, except for short temporary absences, as for example, a vacation or hospitalization."

398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970); Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); Whately v. Clark, 482 F. 2d 1230 (5th Cir. 1973), cert. denied, 415 U.S. 934, 94 S.Ct. 1449, 39 L.Ed,2d 492 (1974). For example, the Supreme Court in Carrington v. Rash, supra, 380 U.S. at 93-96, 85 S.Ct. 775, held that Texas could not constitutionally deny military personnel the right to vote where such military personnel had moved their residence to Texas after their entrance into the military, if those persons otherwise met the state's voter qualification requirements.

Not only is it impermissible to deny the right to vote to students or servicemen who otherwise meet voter qualifications but a city may not dilute the votes persons in a particular district by a

bold assertion that it is populated by a large class of purported transients such as students or servicement. Kirkpatrick v. Preisler, 394 U.S. 526, 534-535, 89 S.Ct. 1225, 1230-1231, 22 L.Ed. 2d 519 (1969); Davis v. Mann, 377 U.S. 678, 691, 84 S.Ct. 1441, 1448, 12 L.Ed.2d 609 (1964). See Egan v. Hammond, 502 P. 2d 356 (Alaska 1972); In re Opinion of the Justices, 111 N.H. 146, 276 A.2d 825 (1971); Tp. of Franklin, etc. v. Board of Ed., etc., 74 N.J. 345, 378 A.2d 213, 219 n. 2 (1977), cert. denied, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978); Seaman v. Fedourich, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778, 784 (1965). See also Mahn v. Howell, 410 U.S. 315, 330-332, 93 S.Ct. 979, 988-989, 35 L.Ed. 2d 320 (1973); Groh v. Egan, 526 P. 2d 863, 869-874 (Alaska 1974).

In Davis v. Mann, supra, 377 U.S. at 691, 84 S. Ct. at 1448, the Supreme

Court rejected the

> "appellants' argument that the underrepresentation . . . (in three counties) is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible."

Similarly, in Kirkpatrick v. Preisler, supra, the Supreme Court rejected Missouri's attempt to explain population variances in its Congressional districting because of large numbers of military personnel and college students present within the district. The Court stated (394 U.S. at 534-535, 89 S.Ct. at 1231):

"Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population; overpopulation in the Eighth District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district correspons to the alleged extraordinary additional numbers of noneligible voters there."

The City of College Park has attempted to justify its assertion that the students are not City residents by pointing to the low number of students who have registered to vote and by statistics supplied by the University indicating that only 900 of the 8,000 on-campus students originally came from Prince George's County. It is questionable whether these facts alone would be sufficient to validly support a conclusion that all students, except those who have registered to vote, are presently transients. However, assuming arguendo that the City could reasonably reach this conclusion, other aspects of the apportionment plan render it unconstitutional.[6]

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6. Even if it could be assumed that voter registration provided sufficient indicia of residency, the use here of the different

apportionment bases of registered voters for one group of persons or districts, and total census population for a different group of persons or districts, might still violate equal protection principles. See Town of Greenburgh v. Board of Supervisors, 53 Misc.2d 88, 277 N.Y.S.2d 885, 895-896 (1967). Although the use of registered voters as an apportionment base seems to be less favored than total or citizen population, see Burns v. Richardson, 384 U.S. 73, 92-93, 86 S. Ct. 1286, 16 L.Ed.2d 376 (1966); Ellis v. Mayor and City Council of Baltimore, 352 F.2d 123 (4th Cir. 1965L; Preisler v. Mayor of City of St. Louis, 303 F. Supp. 1071 (E.D. Mo.1969), it was at least used uni-

In conformance with the circuit court's order to submit a new plan, the City of College Park only excluded students from its apportionment base in the third and fifth districts-the two "student" districts. The students who were excluded were those residing in dormitory facilities who had not registered to vote. The record demonstrates, however, that the City did not attempt either to determine the number of or to exclude those students who had not registered to vote and who resided in the other six districts. For example, the record shows

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formly in all of the districts of the geographic unit in cases which have permitted it to be used. Burns v. Richardson, supra; Martin v. Venables, 401 F.Supp. 611 (D. Conn.1975); Reynolds v. Gallion ex

that the second district contains several fraternity and sorority houses. Students residing in these houses were included in the apportionment base whether or not they had registered to vote. In addition, there is an inference that the City did not exclude those students who lived in private residences or fraternity and sorority houses within the "student districts," i. e., the third and fifth districts.

The concept of equal protection of the laws has traditionally required "the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

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rel. Attorney General of Alabama, 308 f.Supp. 803 (M.D.Ala.1969).

Reynolds v. Sims, supra, 377 U.S. at 565, 84 S.Ct. at 1383. Thus, once a constitutionally permissible apportionment base is chosen, equal protection would generally require that the apportionment base would be applied uniformly to all people and throughout all districts. According to the City's premise that students who have not registered to vote are not domiciliaries, it would seem to follow that all students who are not registered to vote are in the same class and should not be included in the apportionment base, or at least there should likewise be an exclusion of large groups such as those living in the fraternities and sororities in the second district. However, the City of College Park has differentiated among the students by not including in the apportionment base those non-voter

registered students in the third and fifth districts, but including in the base large groups of students in the fraternity and sorority houses in the second district regardless of whether they have registered to vote. Moreover, it ispossible that the City has not even treated large groups of third and fifth district students the same, for there is an inference in the record that the City only excluded unregistered dormitory residents but did not exclude any students living in the fraternities or sororities located in the third district.

The City has offered no explanation for treating significant groups of students differently. In the circumstances of this case, permitting a large number of students who have not registered to vote to be included within the apportionment base while excluding others who are similarly situated, certainly does not

sure that only true domiciliaries will be counted.

In sum, the apportionment plan submitted by the City in accordance with the guidelines laid down by the circuit court, and later approved by the circuit court, contains classifications in the population base whcih cannot be justified when "carefully and meticulously scrutinized" (Reynolds v. Sims, supra, 377 U.S. at 562, 84 S.Ct. 1362). It violates the Equal Protection Clause of the Fourteenth Amendment and Art. 24 of the Maryland Declaration of Rights. See Board v. Goodsell, 284 Md. 279, 293 n. 7, 396 A.2d 1033 (1979).

JUDGMENT REVERSED AND CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. APPELLEES TO PAY COSTS.

447 A2d 838

Renee DuBOIS et al.

v.

CITY OF COLLEGE PARK et al.

No. 96.

Court of Appeals of Maryland.

July 19, 1982.

ELDRIDGE, Judge.

This case, before us for the third time, is the culmination of a suit initially filed in October 1975 by three University of Maryland students challenging the apportionment of councilmanic districts in the City of College Park, Maryland.

The City of College Park is the site of the University of Maryland's principal campus. With a population of approximately 28,000 persons,[1] the City is divided into eight councilmanic districts, each of which elects a City Councilman. A large portion of the third and fifth districts consists of the University of Maryland campus, and all of the University's student dormitories are located in those two districts. At the inception of this suit, the City had apportioned its voting districts by subtracting from its total federal census population those students who resided on the University campus.

That base was then divided equally into the eight councilmanic districts.

In October 1975 three students, all registered voters of College Park, filed a class action in the Circuit Court for Prince George's County alleging that the apportionment scheme employed by the City violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection principle embodied in Article 24 of the Maryland Declaration of Rights. The plaintiffs claimed that the exclusion of on-campus students from the apportionment base diluted their votes because the third and fifth districts contained two to three times the population of the other six districts. The circuit court dismissed the claim, concluding that the three plaintiffs had no standing to maintain the action because they were not domiciled in College Park and were not properly regitered to vote.

On appeal, in DuBois v. City of College Park, 280 Md. 525, 375 A.2d 1098 (1977) (DuBois I), this Court reversed, deciding that the plaintiffs' status as registered voters of the City gave them standing to challenge the apportionment of the councilmanic districts. We held that a collateral attack upon the plaintiffs' status as registered voters could not be made by raising the issue of standing in a reapportionment case, and that any challenge to the plaintiffs' voter status must be made through the procedures prescribed by statute and the City Charter for making such challenges. 280 Md. at 529, 533-534, 375 A.2d 1098. The case was remanded for a determination of the merits.

Following the remand, the circuit court held that the councilmanic districts were unconstitutionally apportioned. The circuit court went on to approve a new apportionment plan which, in six districts,

was based upon total population and included all students in the apportionment base. However, with respect to the third and fifth councilmanic districts, the new plan included in the population base all off-campus students and all on-campus students who had registered to vote. The new plan excluded from the base all on-campus students in the third and fifth districts who had not registered to vote.

This Court reviewed the constitutionality of the new apportionment plan in DuBois v. City of College Park, 286 Md. 677, 410 A2d 577 (1980) (DuBois II). Because the plan included all students from districts one, two, four, six, seven and eight in the apportionment base, whether they were registered to vote or not, while excluding on-campus students in districts three and five from the base unless they were reistered voters, the Court held that the plan violated the Equal Protection Clause of the Fourteenth

Amendment and Article 24 of the Maryland Declaration of Rights. 286 Md. at 691, 410 A.2d 577. The case was again remanded for further proceedings.

Thereafter, the City Council of College Park adopted a plan to apportion the districts entirely on the basis of registered voters rather than total population. Under this plan the City will eradicate previous voter registration lists and "conduct an entirely new City-wide voter registration drive." Each housing unit in the City is to be advised of the registration drive. In addition, the City will "deputize" a substantial number of persons whose duty it will be to ensure that all registrants are residents of College Park. Within three months after completion of the registration drive the City will be apportioned into eight districts. Districts are to be reapportioned every five years if there is variance of five percent or more in the number

of registered voters between any district and the mathematical average of all districts. To implement this plan the City would amend its Charter and rescind all inconsistent portions of the present Charter. Finally, voting eligibility requirements are not to be changed.

The above-summarized plan was approved by the circuit court after a hearing, and the plaintiffs took an appeal to the Court of Special Appeals, claiming that the plan is unconstitutional. As in DuBois I and DuBois II, we issued a writ of certiorari prior to a hearing in the intermediate appellate court.[2]

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2. The plan described in the text was designated "Plan B" by the City Council. The City Council also adopted an alternative plan, Plan A, which proposed that a census be taken to determine the number of College Park domiciliaries. From

the results of that census, districts would be evenly apportioned. The plan under consideration here, Plan B, was, however, the City's preferred choice as indicated by the following colloquy at oral argument before us:

> "COUNSEL FOR THE CITY: We have submitted the cross-appeal on Plan A in the event that the Court would find Judge Mattingly's ruling on Plan B...
>
> THE COURT: You only want us to... reach your cross-appeal if we reverse on their appeal (challenging Plan B).
>
> COUNSEL FOR THE CITY: That is correct...
>
> THE COURT: So this is really a concession, a stipulation, that the City really wants Plan B.
>
> COUNSEL FOR THE CITY: That's

The plaintiffs' constitutional objection to College Park's plan is that the apportionment is based upon registered voters rather than total federal census population. The plaintiffs, using registered voter figures for the year 1975, claim that persons in councilmanic districts three and five will continue to be underrepresented in light of the 1970 federal census.

The Supreme Court, in Reynold v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964), held that, under the Equal Protection Clause, a state legislature "must be apportioned on a population basis."

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correct."

Thus, because of our decision in this case, we need not and do not consider the constitutionality of Plan A.

While pointing out that some "divergences from a strict population standard" are constitutionally permissible if "based on legitimate considerations incident to the effectuation of a rational state policy," the Court in Reynolds nevertheless held that "the overriding objective must be substantial equality of population among the varous districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579, 84 S.Ct. at 1390. As pointed out by us in DuBois II, 286 Md. at 684, n.4, 410 A.2d 577, the princples set forth in Reynolds v. Sims, and in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), extend to elected local government units exercising substantial governmental authority. See Town of Lockport v. Citizens For Community Action, 430 U.S. 259, 266, n. 11, 97 S.Ct. 1047, 1052, n. 11, 51 L.Ed.2d 313(1977); Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904,

29 L.Ed.2d 399 (1971); Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); Montgomery County v.Garrott, 243 Md. 634, 639, 222 A.2d 164 (1966).

While population is the basis upon which districts must be apportioned, the plaintiffs' argument in this case overlooks the holdings of the Supreme Court that such a population basis is not required to be the federal census figures in all cases. Thus, the use of "citizen" or "domiciliary" population may be permissible rather than total census population. Furthermore, if the use of registered voters as a basis produces a distribution of elected representatives substantially the same as a permissible population basis would produce, registered voters may be used. This was made clear by the Supreme Court in Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

In Burns v. Richardson, the State of

of Hawaii, because of its large transient population, proposed to use registered voters as the basis for apportionment of the state legislature. Those challenging the plan, like the plaintiffs in the case at bar, pointed to "the sizable differences in results produced by . . . distribution (according to registered voters) in contrast to that produced by the distribution according to the State's total population, as measured by the federal census figures." 384 U.S. at 90, 86 S.Ct. at 1295. The Supreme Court responded by holding that the population basis for apportionment under Reynolds v. Sims did not necessarily mean federal census population (Burns, 384 U.S. at 91, 86 S.Ct. at 1296):

> "The holding in Reynolds v. Sims, as we characterized it in the other cases decided on the same day, is

that both houses of a bicameral state legislature must be apportioned substantially on a population basis.' We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in that case and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinc-

tion between the acceptability of such a test and a test based on total population."

In the language just as applicable to College Park with its large transient student population, as to Hawaii with its large transient military population, the Court continued (id. at 92, 86 S.Ct. at 1296):

> "Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured."

The Court in Burns then pointed out that the use of registered voters or actual voters as the basis for apportionment does present some problems (id. at 92-93, 86 S.Ct. at 1296-1297):

> "Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participte in the electoral process, or perpetuate a 'ghost of prior malapportionment.' Moreover, 'fluctuations in the number of registered voters in a given election may be sudden and substantial; caused by such fortuitous factors

as a peculiarly controversial election issue, a particularyly popular candidate, or even weather conditions.' Ellis v. Mayor & City Council of Baltimore, 352 F.2d 123, 130 (C.A. 4th Cir. 1965). Such effects must be particularyly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years."

The Court then held that Hawaii's use of registered voters as the basis for apportionment

"satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population

basis." (id. at 93, 86 S.Ct. at 1297).

The fact that apportionment on a voter registration basis failed to result in the same distribution as apportionment on a federal census population basis was deemed "insufficient to establish constitutional deficiency in light of the large transient military population and large number of tourists who may have been counted in the census figures. Id. at 94-95, 86 S.Ct. at 1297-1298. The Court, reiterating that "it is enough if it appears that the distribution of registered voters approximated distribution of . . . citizens or any other permissible population base" (id. at 95, 86 S.Ct. at 1298), stated that it found no error in the trial court's "conclusion that the apportionment achieved by use of a registered voters basis substanti-

ally approximated that which would have appeared had . . . citizen population been the guide." Id. at 96, 86 S.Ct. at 1298.

Consequently, the teaching of Burns v. Richardson is that voter registration, to be valid as an apportionment base, need not produce the same result as the use of federal census population would produce. Instead, voter registration may be used as an apportionment base if it produces a result not substantially different than that which would be produced by the use of another permissible population base, such as citizen population. See also, Gaffney v. Cummings, 412 U.S. 735, 746-748, 93 S.Ct. 2321, 2328-2329, 37 L.Ed.2d 298 (1973), Ely v. Klahr, 403 U.S. 108, 115, n. 7, 91 S.Ct. 1803, 1807, n. 7, 29 L.Ed.2d 352 (1971); Pate v. El Paso County, Texas, 337 F. Supp. 95 (S.D. Tex.) aff'd 400 U.S. 806,

91 S. Ct. 55, 27 L.Ed.2d 38 (1970); Borough of Bethel Park v. Stans, 319 F. Supp. 971, 977 (W.D.Pa. 1970), aff'd 449 F.2d 575 (3d Cir. 1971); Egan v. Hammond, 502 P.2d 856 (Alaska 1972). Cf., Ellis v. Mayor And City Council of Baltimore, 352 F. 2d 123 (4th Cir. 1965).

Applying these principles to the present case produces a clear result. The plaintiffs have utterly failed to show that the use of voter registration as the apportionment base under College Park's new plan will produce a result substantially different than would be produced under a permissible population base. In fact, no such showing could be made at this time, as under the plan approved by the circuit court the present voter registration lists will be cancelled, and new voter registration lists will compiled following a voter registration drive. After the new

voter registration lists are compiled, the apportionment plan might possibly result in the same distribution among districts as a plan based upon the 1980 federal census. Or the plan based on the new voter registration lists may result in the same distribution among districts as a plan based upon citizen or domiciliary population. College Park's new apportionment plan, which is not yet implemented, does not on its face violate equal protection principles.

JUDGMENT AFFIRMED.

PETITIONERS TO PAY COSTS.